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February 16, 2017

Ex Parte

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Universal Service Reform—Mobility Fund*, WT Docket No. 10-208
Connect America Fund, WC Docket No. 10-90

Dear Ms. Dortch:

As the nation's leading association for competitive wireless providers—including small, rural providers serving fewer than 5,000 customers—Competitive Carriers Association ("CCA") supports the efforts of the Federal Communications Commission ("FCC" or "Commission") to ensure that the universal service fund ("USF") is used to preserve and expand wireless services in rural America. CCA and its members are concerned, however, that the Commission's hasty effort to adopt Phase II of the Mobility Fund ("MFII") misses the mark. In particular, certain aspects of the proposed MFII framework violate the Commission's statutory obligations under Section 254 of the Communications Act, while other aspects depart without plausible explanation from the Commission's past actions and defy other principles of reasoned decision-making.

This proceeding cries out for publication of the draft order with sufficient time for review and comment, a step toward transparency and improved outcomes that both the Chairman and Commissioner O'Rielly have proposed.[1] It also calls for rigorous examination of the reliability of the data on which the Commission will rely, and consideration of the costs and benefits of the Commission's proposals, efforts that both leaders, again, have rightly supported.[2] The need for

[1] *See, e.g.*, Press Release, Federal Communications Commission, Statement of FCC Chairman Ajit Pai Announcing Pilot Program to Release Commission Documents to the Public, at ¶ 1 (Feb. 2, 2017) ("Statement of FCC Chairman Pai Announcing Pilot Program"), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0202/DOC-343303A1.pdf; Commissioner Michael O'Rielly, *Update on Advance Posting of Commission Meeting Items*, FEDERAL COMMUNICATIONS COMMISSION BLOG (Jan. 16, 2015), https://www.fcc.gov/blog/update-advance-posting-commission-meeting-items.

[2] *See, e.g.*, Remarks of FCC Commissioner Michael O'Rielly at TPRC 44: Research Conference on Communications, Information and Internet Policy, at 2 (Sept. 30, 2016) ("O'Rielly Remarks Before TPRC 44"), https://apps.fcc.gov/edocs_public/attachmatch/DOC-341544A1.pdf; Remarks of FCC Commissioner Ajit Pai Before the Free State Foundation's Tenth Anniversary

quality assurance in this proceeding is simple. Rural America cannot shoulder a misfire on MFII. Indeed, for rural Americans in particular, the consequences of a poorly crafted and implemented MFII would be difficult to overstate. An underdeveloped proposal could altogether eliminate wireless connectivity in some hard-to-serve areas—thereby shutting off some Americans' only on-the-spot access to life-saving emergency services.[3] It could defer indefinitely the long-held aspirations of rural Americans and businesses to gain wireless broadband access for the first time.[4] And for rural Americans with no choice but to purchase wireless services from an incumbent provider, the Commission's imprecision could further delay the achievement of speeds that Americans in urban areas have enjoyed for years, with a bare trickle of future improvements.[5]

Significantly, setbacks in the availability of wireless service also will have far-reaching effects well beyond the Chairman's immediate goal of digital inclusion. They will hinder complementary initiatives in rural development, including building infrastructure that supports new jobs for rural Americans in their own communities, fueling technology-driven enhancements in agricultural productivity,[6] and supporting telemedicine and e-learning programs that are even more essential in rural areas than in urban ones.[7]

Gala Luncheon (Dec. 7, 2016), https://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db1207/DOC-342497A1.pdf.

[3] *See, e.g.*, Comments of Cellular South Licenses, LLC d/b/a C Spire at 8, WT Docket No. 10-208 *et al.*, (filed Aug. 8, 2014) ("C Spire Comments"); Letter from Jill Canfield, Vice President, NTCA-The Rural Broadband Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 1, WT Docket No. 10-208 *et al.*, (Oct. 27, 2016) ("NTCA Oct. 27, 2016 Ex Parte); Letter from Caressa D. Bennet, General Counsel, Rural Wireless Association, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, at 5, WT Docket No. 10-208 *et al.*, (Oct. 27, 2016) ("RWA Oct. 27, 2016 Ex Parte").

[4] *See* NTCA Oct. 27, 2016 Ex Parte at 1.

[5] *See, e.g.*, RWA Oct. 27, 2016 Ex Parte at 3; Letter from Caressa D. Bennet, General Counsel, Rural Wireless Association, Inc., to Marlene F. Dortch, Secretary, Federal Communications Commission, at 3, WT Docket No. 10-208 *et al.* (Nov. 10, 2016) ("RWA Nov. 10, 2016 Ex Parte").

[6] *See, e.g.*, Letter from Mark N. Lewellen, Manager, Spectrum Policy, Deere & Company, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 1, WT Docket No. 10-208 *et al.*, (Nov. 10, 2016).

[7] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in A Reasonable & Timely Fashion*, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, 30 FCC Rcd. 1375 ¶ 31 (2015) (noting that "[t]elemedicine and distance learning that require real-time video conferencing are also surging in popularity, especially in rural areas"); *see also* Press Release, Federal Communications Commission, Statement of Commission Ajit Pai on Health Care Technology Presentation, at 1 (Jan. 31, 2013), https://apps.fcc.gov/edocs_public/attachmatch/DOC-318693A1.pdf (discussing the importance of the Commission's rural health care initiatives).

These unintended consequences are the foreseeable result of the MFII framework that the Commission intends to consider in just one week's time. That framework comprises inconsistent minimum speed requirements, eligibility determinations driven by poor data on service availability, and flash cuts in legacy support that stand to reduce wireless access in areas that the Commission "deems" covered by an unsubsidized provider, but that in fact are either served exclusively by a small or regional carrier or are entirely unserved. And the framework's hastily designed challenge process intended as a safety valve to alleviate inaccurate eligibility determinations is not up to that task. Burdensome and bureaucratic parcel-by-parcel challenges will become the norm, not the exception, given the unreliability of the Commission's initial eligibility determinations. Moreover, those challenges will still create an incomplete picture of the current state of broadband coverage across the United States. Perhaps worse, they will deplete the resources of the Commission and small carriers alike—unless the burden of filing such challenges is so overwhelming that rural carriers are forced to give in.

CCA remains confident, however, that the Commission and the industry can work together to forge a stronger path forward for rural Americans. A short delay to allow transparency and public input, and to truly evaluate the best data to underlie critical MFII determinations, will provide the Commission with the necessary tools to construct a final framework that will advance the fundamental goal of universal service and protect the important rural issues that are at stake. Precipitous action on the item, on the other hand, will open the door to procedural challenges on appeal, while also making it more difficult to demonstrate the deliberative, reasoned decision-making that will be required on review of the merits of the Commission's new policies.

One can imagine no better occasion to inject transparency into Commission rulemaking than to release the full text of the upcoming MFII item, and to allow the public a more meaningful opportunity to review and provide input on the considerable work remaining in this proceeding. As the Chairman put it, "rather than keeping [the item] behind closed doors until after our vote," releasing the text of the MFII item "will increase the public's understanding of [the Commission's] decision-making process, and result in final rules that better serve the public interest."[8] Particularly given the significant change of direction embodied by the Commission's MFII item, the Commission should take the time to address and resolve the concerns raised on the record by Congress,[9] CCA, CCA members, and others, including those set forth below.

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[8] Press Release, Federal Communications Commission, FCC Chairman Pai Takes First Step to Increase Transparency of Rulemakings, at ¶ 2(Feb. 2, 2017), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0202/DOC-343300A1.pdf.

[9] Letter from U.S. Senator Roger F. Wicker and U.S. Senator Joe Manchin, *et al.*, to Chairman Ajit Pai, Federal Communications Commission, at ¶ 4 (Feb. 2, 2017) ("As you move forward with MFII, we ask that your efforts help to incent wireless carriers to preserve, upgrade, and expand mobile broadband in rural America, rather than degrade and reduce competition in areas that need it most.").

I. The Commission Must Ensure that Rural Americans Have Access to LTE Services That Are Reasonably Comparable to LTE Service in Urban Areas.

Section 254(b) of the Communications Act "provides that the FCC 'shall' base its universal service policies on" statutory principles established by Congress.[10] Those principles include the provision of "advanced telecommunications and information services" to consumers "in all regions of the Nation," of "[q]uality services" to all Americans at "just, reasonable, and affordable rates,"[11] and of services in "rural, insular, and high cost areas" that are "reasonably comparable" to those provided in urban areas at reasonably comparable rates.[12]

Because the "plain text of the statute . . . indicates a mandatory duty on the FCC," the Commission's discretion in setting universal service policy is circumscribed.[13] The Commission "may not depart" from the principles in Section 254(b) "to achieve some other goal," and may only "exercise its discretion to balance the principles against one another when they conflict."[14] As a result, the Commission "must work to achieve each" principle listed in Section 254(b) "unless there is a direct conflict between it and either another listed principle or some other obligation or limitation on the FCC's authority."[15] To determine whether a direct conflict between competing universal service principles exists, and to resolve a direct conflict where one exists, the Commission must engage in reasoned decision-making. Fundamental precepts of reasoned decision-making require the Commission to articulate a "precise" understanding of each statutory principle,[16] and to make a "rational and informed decision[] on the record before it" about the balance struck.[17]

These obligations require the Commission to adopt an MFII framework that promotes access to LTE services at speeds that meet the needs of rural consumers and are reasonably comparable to the services available in urban areas. To accomplish that goal, the Commission cannot simply adopt a reasonable minimal speed requirement for carriers that receive MFII support in *eligible* areas. The Commission also must adopt a reasonable minimum speed

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[10] *Qwest Corp. v. FCC*, 258 F.3d 1191, 1199 (10th Cir. 2001).

[11] *See* 47 U.S.C. § 254(b)(1).

[12] *See id*. § 254(b)(3).

[13] *Qwest*, 258 F.3d at 1199; *see also Pierce v. Underwood*, 108 S. Ct. 2541, 2552 (1988) (noting that "shall" is "mandatory language").

[14] *Qwest*, 258 F.3d at 1200; *see also In re FCC 11-161*, 753 F.3d 1015, 1055 (10th Cir. 2014); *accord Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 434 (5th Cir. 1999) (noting that even the Commission's limited discretion to "balance the competing concerns set forth in § 254(b) . . . is not absolute").

[15] *Qwest*, 258 F.3d at 1199-1200.

[16] *Id.* at 1201.

[17] *Id.* at 1203.

threshold for determining that an area is *ineligible* for MFII support based on existing service availability.

Specifically, if the Commission chooses to disqualify areas from MFII eligibility based on existing unsubsidized LTE service availability, that existing coverage must deliver speeds that meet the statutory requirement of reasonably comparable wireless service. That is because a determination of ineligibility for MFII support will maintain the status quo in the ineligible areas. If the existing state of affairs is associated with subpar LTE speeds, the Commission's denial of MFII funding would condemn consumers to services that fail to satisfy the core statutory principles of universal service policy.

This is particularly true because many ineligible areas in rural America will be served by just one incumbent unsubsidized provider, and will not support entry by an additional carrier without MFII participation. In these areas, the Commission cannot reasonably expect competitive market forces to encourage improvements in network capacity and higher data rates in a reasonable timeframe. Critically, the unsubsidized incumbent would face no affirmative requirement to improve speeds and service quality absent the threat of competitive entry. Existing buildout requirements that apply to holders of LTE spectrum do not require licensees to achieve coverage that meets an established speed threshold,[18] and the speed-based performance requirements contemplated by the Commission would apply only to recipients of MFII support.

In light of these impacts, the record is clear that a 5 Mbps/1 Mbps threshold for determining whether an unsubsidized incumbent provides qualifying LTE service would be arbitrary and contradict the Commission's statutory mandate.

First, the Commission has explicitly determined that 5 Mbps/1 Mbps mobile service is insufficient to meet wireless consumers' existing requirements. In the *2016 Broadband Progress Report*, the Commission found that "5 Mbps/1Mbps" service is insufficient to support "uses that require high speeds," including "video calls, streaming media and real-time educational courses" that are "becoming increasingly common."[19] These applications are especially critical to rural Americans, as they support satellite work sites, telework, telemedicine and rural learning initiatives, as the record demonstrates[20] and as the Commission has recognized.[21] Having made

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[18] *See, e.g.*, 47 C.F.R. § 27.14.

[19] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Development Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 2016 Broadband Progress Report, 31 FCC Rcd. 699 ¶ 58 (2016) ("2016 Broadband Progress Report").

[20] *See* Comments of Competitive Carriers Association at 5-6, WT Docket No. 20-208 *et al.*, (filed Jan. 11, 2017) (discussing the critical importance of mobile connections to healthcare and education).

[21] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such*

this finding, the FCC cannot reasonably conclude that 5 Mbps/1 Mbps LTE services are "quality" or "advanced telecommunications services" within the meaning of Section 254(b). Nor can the Commission reasonably conclude that a 5 Mbps/1 Mbps mobile connection is capable of supporting the "advanced . . . information services" that the Commission must make available in "all regions" of the country.[22]

Second, the Commission has found that Americans living in urban areas are almost twice as likely to have access to LTE at speeds of 10 Mbps/1 Mbps.[23] Specifically, the Commission noted that 87 percent of rural Americans, compared to just 45 percent of Americans in urban areas, lack access to LTE service with a minimum advertised speed of 10 Mbps/1 Mbps LTE service.[24] This disparity provides clear evidence that 5 Mbps/1 Mbps service is not "reasonably comparable" to the service available to urban consumers today, and will be even further behind pace by the time the Commission makes final determinations on which areas qualify for MFII support.[25]

Third, if the Commission requires recipients of MFII support to provide service in excess of 5 Mbps/1 Mbps as proposed in the *Further Notice*,[26] the adoption of a lower 5 Mbps/1 Mbps threshold for defining eligible areas would be plainly arbitrary. There is no basis for concluding that consumers in areas ineligible for MFII support demand less from their wireless connections than consumers in eligible areas.[27] Moreover, by using inconsistent speeds for eligibility determinations and performance requirements, the Commission's MFII framework risks creating the very kind of disparities in access that the statute prohibits.[28]

Development Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, 2015 Broadband Progress Report, 30 FCC Rcd. 1375 (2015).

[22] *See* 47 U.S.C. § 254(b)(2).

[23] 2016 Broadband Progress Report at ¶ 83.

[24] *Id.*

[25] Comments of the Rural Wireless Carriers at 14, WT Docket No. 10-208 *et al.*, (filed Aug. 8, 2014).

[26] *Connect Am. Fund*, Report and Order, Declaratory Ruling, Order, Memorandum Opinion and Order, Seventh Order on Reconsideration, and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 7051 ¶¶ 138-140 (2014) ("*Further Notice*").

[27] RWA Nov. 10, 2016 Ex Parte at 3 ("Because the Commission has proposed adopting MFII service requirements including speeds of 10/1 Megabits per second ('Mbps'), it should also use this 10/1 Mbps threshold to further define eligible areas").

[28] *See* 47 U.S.C. § 254(b).

II. The MFII Framework Must Promote the "Preservation and Advancement of Universal Service."

In addition to promoting access to quality, reasonably comparable, and advanced telecommunications and information services, the Commission's universal service policies must promote the "preservation and advancement of universal service."[29] In the *Further Notice*, the Commission interpreted this statutory directive as requiring MFII to "preserv[e] service that otherwise would not exist" and "expand[] access to 4G LTE in those areas that the market will not serve."[30] As a logical matter, the Commission cannot meet its goal of *preserving* universal service if changes to MFII support mechanisms lead to *reductions* in service. Moreover, the Commission cannot claim to expand access to LTE if MFII support mechanisms systematically overlook locations that the market will not serve. At a minimum, the Commission can only accept these digressions from core principles of universal service if doing so would serve another countervailing principle of universal service.[31] Reasoned decision-making—and Congress's clear statutory directives—demand at least that much.

The Commission's ability to preserve and advance universal service will depend on properly making targeted determinations of where qualifying service availability exists.

First, eligibility determinations that are inaccurate or overbroad could cause areas that are currently served to lose service altogether. This is because areas that the Commission *deems* to be covered by an unsubsidized provider would become ineligible for continued support, even if the only provider *actually* to offer service relies on a subsidy. As a result, subsidized carriers that actually serve areas deemed ineligible under the new MFII framework may lose support and have to decommission existing facilities—especially if the Commission declines to adopt a reasonable legacy support mechanism for these providers.[32] As CCA has explained previously, "[r]educing universal service support for wireless services will force carriers to strand facility investments and thereby leave rural consumers without a wireless choice."[33] C Spire confirms

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[29] *Id.;* § 254(b)(5); *Qwest*, 258 F.3d at 1196 (noting that "Congress codified its continued commitment to preserving universal service" in Section 254(b)).

[30] *Further Notice* ¶ 239; *see also Connect Am. Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 ¶¶ 298-99 (2011) ("*USF/ICC Transformation Order"*).

[31] *Qwest*, 258 F.3d at 1200.

[32] *See, e.g.*, RWA Oct. 27, 2016 Ex Parte at 3 (when "coverage is overstated by an unsubsidized carrier," the "inaccuracy . . . could result in an area being deemed ineligible for MFII funds, and the disappearance of coverage provided by a subsidized carrier"); Letter from David A. LaFuria, Counsel, Union Wireless, MTPCS, LLC, and Carolina West Wireless, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, at 1 & Attachment p. 2, WT Docket No. 10-208 *et al.*, (Jun. 25, 2013).

[33] Reply Comments of Competitive Carriers Association at 8-9, WT Docket No. 10-208 *et al.*, (Sept. 8, 2014) ("CCA 2014 Reply Comments").

that "[o]nce facilities are constructed in rural and high-cost areas . . . [a]ny further reduction could well result in carriers[']decommissioning existing facilities—thereby *reducing* mobile broadband services in some rural areas."[34] Importantly, this result would be especially disastrous to rural consumers, who often rely on wireless communications as their sole form of voice communication and who are much more likely than urban counterparts to be traveling away from fixed line communications.[35] In addition to depriving these consumers of access to the public switched telephone and internet networks, it will cut off these consumers' on-the-spot access to emergency services and E911.[36]

Second, eligibility determinations that are inaccurate or overbroad will result in currently unserved areas remaining unserved. If the FCC cannot determine the actual coverage of carriers at a specified service level, it risks identifying areas as receiving qualifying service, even when they do not actually receive that service nor possess the ability to be served by the market. This outcome typically occurs at the edge of carriers' coverage areas, but can also occur in the middle. As anyone who has traveled in rural America knows, mobile service coverage can come and go with every turn or dip in the road. These unserved areas are areas where the existing unsubsidized provider has chosen not to build, or which are hidden from existing networks due to topological challenges. Given the current state of the FCC's data, these pockets nevertheless could appear to be served due to data quality issues, or due to an overbroad determination that the provision of unsubsidized service somewhere in a given area equates to service throughout the area. Under the proposed MFII framework, such inaccurate or crude determinations will deprive these unserved areas of eligibility for a subsidy, even though these areas are not served and the market will not support the expansion of facilities to serve them.

As explained in more detail below, an eligibility test based on Form 477 data, with a challenge process based on untested data, necessarily will result in inaccurate and systematically overbroad definitions of eligible areas. That, in turn, will result in potentially disastrous service reductions and limitations on service expansions in the many square miles of rural America that are located near an unsubsidized provider's point of presence, but are not served by the unsubsidized provider.

A. Form 477 data, including shapefile data, cannot support accurate determinations of existing qualifying service availability.

Because of the poor information quality and imprecision of Form 477 data, including the shapefiles submitted by carriers as part of the Form 477 process, determinations about which areas are eligible for MFII funding that rely on Form 477 data necessarily will be inaccurate and overbroad.

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[34] C Spire Comments at 8.

[35] CCA 2014 Reply Comments at 3-4.

[36] *See, e.g.*, C Spire Comments at 10; NTCA Oct. 27, 2016 Ex Parte at 1; RWA Nov. 10, 2016 Ex Parte at 5.

The Form 477 suffers from poor data quality. Form 477 data suffers from a number of flaws that render it unreliable for use in determining mobile service availability. As an initial matter, and as the Commission has recognized, Form 477 information is self-reported by carriers, and therefore subject to routine "fail[ures] to report data or misreport[ing] of data."[37] Moreover, the Commission allows carriers on Form 477 to report advertised speeds rather than actual speeds—and advertised speeds obviously provide a poor proxy for determining the actual speeds that the consumer receives, especially in rural areas.

Form 477 data also lacks any objective standard for how carriers should report network coverage. As CCA has explained in detail, the FCC permits each carrier "to choose the propagation model, loss assumptions and performance levels necessary to determine mobile broadband coverage."[38] Indeed, as AT&T recently stated, "carriers are not required to publicly disclose their Form 477 methodologies."[39] But "even small variations in the model used or the assumptions on which the model relies can result in dramatic changes in predicted coverage."[40] Importantly, these small changes can overstate coverage by much as "100% or more," and affect definitions of MFII-eligible areas across "hundreds of thousands of square miles."[41] Moreover, third-party analysis of the Commission's mobile broadband coverage data confirms that many providers report coverage data at low resolution, a practice that "tend[s] to exaggerate coverage."[42] Finally, predictions of coverage contained in these non-standard, carrier-generated

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[37] 2016 Broadband Progress Report at n.234.

[38] Letter from Trey Hanbury, Counsel, Competitive Carriers Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 1, WT Docket No. 10-208 *et al.*, (Oct. 25, 2016) ("CCA Oct. 25, 2016 Ex Parte"); *see also* Letter from David A. LaFuria, Counsel, C Spire Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission, at ¶ 1,WT Docket No. 10-208 *et al.* (Oct. 21, 2016) ("C Spire Oct. 21, 2016 Ex Parte") (noting that "carriers have used significantly different methodologies to generate Form 477 coverage data, resulting in significantly different levels of coverage being depicted on Form 477 maps. Without a consistent set of standards for submitting this engineering data, the overall picture of where coverage and 4G LTE service are available is inaccurate").

[39] Letter from Mary L. Henze, AT&T Services, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 10-208 *et al*. (Feb. 15, 2017).

[40] CCA Oct. 25, 2016 Ex Parte at 1.

[41] *Id.* at Attachment.

[42] *Id.; see also* Letter from David A. LaFuria, Counsel, U.S. Cellular, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 10-208 *et al.*, (Oct. 27, 2016); C Spire Oct. 21, 2016 Ex Parte at ¶ 1; Letter from David A. LaFuria, Counsel for U.S. Cellular, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 10-208 (Feb. 25, 2016) ("U.S. Cellular Feb. 25., 2016 Ex Parte") (attaching CostQuest study).

shapefiles do not fully account for real-world conditions that impact the availability of service in a given area.

For all these reasons, information provided as part of the Form 477 process would be of little practical use for determining whether a particular area is actually served by a qualifying unsubsidized provider of mobile broadband, even assuming that all carriers have implemented proper controls to ensure the completeness and accuracy of their Form 477 data and coverage maps. As the Commission itself determined, Form 477 data supports, at best, "coverage *estimates*," and in any event the shapefiles that are the subject of recent debate "do not indicate the extent to which providers affirmatively offer service to residents in the covered areas."[43]

The Form 477 will produce overbroad coverage data. Form 477 allows carriers to report their mobile broadband service *availability* by census block using a centroid methodology. Under the centroid methodology, a carrier can report an entire census block as served even if only a tiny portion of the census block is *actually* served, so long as it advertises wireless service to actual and potential customers in the area. As the Commission itself has recognized, this remarkable overbreadth in broadband coverage reporting "may overstate the deployment of services throughout an area" by "indicat[ing] that the services are offered to Americans residing within the census block even if services are offered only to a portion of the residents residing in that census block."[44]

Importantly, if the Commission chooses to rely upon the shapefiles that providers submit as part of the Form 477 process to evaluate coverage at the sub-census block level, it must not define areas ineligible for support too broadly, or it will repeat the flaws inherent in a centroid-based analysis. The process of translating coverage maps into auctionable areas, such as square mile parcels, will surely result in many parcels that are only partially served with LTE. At a minimum, the Commission should include in the ultimate reverse auction these parcels that are only partially covered by qualifying LTE service. To do otherwise would deny support to areas that are already determined to be unserved. Of course, even this step would not resolve the problems with data quality associated with non-standard, carrier-generated shapefiles, which will disqualify unserved areas from MFII for the reasons described above.

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[43] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Nineteenth Report, 31 FCC Rcd. 10534 ¶ 104 (2016).

[44] 2016 Broadband Progress Report at n.234; *see also* Federal Communications Commission, Wireless Telecommunications Bureau, *Working Toward Mobility Fund II: Mobile Broadband Coverage Data and Analysis* ¶ 21 (Sept. 30, 2016), https://ecfsapi.fcc.gov/file/09302412817453/DOC-341539A1.pdf ("*2016 MFII Staff Report*") (noting that the centroid method may "overstate coverage in certain blocks, especially in large or irregularly shaped blocks").

B. A challenge process cannot remedy the flaws inherent in Form 477 data and would impose substantial burdens on the Commission and industry.

The Commission proposes to correct the flaws inherent in Form 477 speed and coverage data by allowing carriers to challenge initial determinations as to whether qualifying service is available in a particular parcel. As explained below, however, the Commission's solution would be arbitrary, and at a minimum calls for further examination of the accuracy of the results that a challenge process reasonably could be expected to yield.

First, given the poor quality and overbreadth concerns of Form 477 data described above, the Commission's "challenge" process will become the rule and not the exception, and will create enormous burdens for Commission staff and challengers alike—indeed, potentially hundreds of thousands of census blocks may be challenged in one direction or the other.[45] Critically, the burden on carriers to challenge these blocks is unfathomable and, as described below, would violate the Paperwork Reduction Act ("PRA").

Second, the Commission has yet to evaluate whether data available to challenge process participants would yield the greater accuracy required to cure the defects of the Commission's crude initial eligibility determinations. To the contrary, the Commission itself has suggested that commercially available alternatives to Form 477 data that it has previously examined are likely to repeat or compound inaccuracies in broadband coverage estimates without careful refinements and testing of methodology.[46] While the Commission should examine the utility of today's commercially available sources of coverage data, it has yet to do so to date. Instead, the Commission has merely released a report evaluating its vision of how Form 477 data would support MFII initial determinations. If the Commission believes that a challenge process can correct errors in those initial determinations, it must conduct a similar analysis to evaluate the data that it proposes challengers use, seek comment on its methodology and results, and, as discussed further below, subject that analysis to the peer review process.[47] Otherwise, the Commission's obligation is clear: it must reduce the number of blocks that may be challenged.

Third, the Commission has failed to evaluate alternative, and more accurate, methods of arriving at initial eligibility determinations. This is the case even though parties including CCA have called for the Commission to task the Wireless Telecommunications Bureau to "review

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[45] *See* Letter from W. Allen Gillum, CEO & General Manager, Appalachian Wireless, *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 2, WT Docket No. 10-208, *et al.*, (Feb. 14, 2017) ("Wireless Executives Ex Parte").

[46] *2016 MFII Staff Report* ¶¶ 6-8.

[47] *See Implementation of Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Pursuant to Section 515 of Public Law No. 105-554*, Information Quality Guidelines, 17 FCC Rcd. 19890, 3 (2002) ("Information Quality Guidelines") (requiring every FCC Bureau or Office to conduct a review for data "quality, objectivity, utility, and integrity").

how best to update and improve the current coverage data" in light of its flaws.[48] Moreover, some parties in this proceeding have proposed more accurate alternatives to Form 477 data.[49] Instead of evaluating those proposals, the Bureau "rejected" them without analysis, claiming that they would be "too difficult to implement in the short period of time in which the Bureau has been directed to complete the MFII framework."[50] While the Commission may consider the time and cost associated with examining new and potentially more accurate data, it cannot use data that it knows to be inaccurate simply because it wishes to meet an internal bureaucratic deadline. Indeed, it would be plainly irrational for the Commission to reject alternative approaches based on timing, when the result of using Form 477 data would be to create even longer delays, and more substantial industry burdens, by relying on a challenge process.

Thus, it is clear that the challenge process would turn on its head Commissioner O'Rielly's charge for the Commission "to take seriously [its] obligation to evaluate objectively the consequences of [its] actions," and flunk any detailed cost-benefit analysis.[51] It is equally clear that the Commission has bypassed its obligation to "use data to inform and evaluate programs and policies to make them more effective"[52]—another key aspiration of Commissioner O'Rielly.

C. The use of Form 477 data, and the challenge process, would violate the requirements under the Information Quality Act and Paperwork Reduction Act.

The PRA and Information Quality Act ("IQA") require the Commission to ensure that it collects and uses information that is reliable, accurate, and useful, and that it does so in a way that minimizes burdens on American businesses. As explained below, the current proposal violates both Acts. At a minimum, these statutes require the Commission to make findings about the rationality of its use of data that the Commission cannot rationally make on the record before it. Instead of boxing itself into a decision that would be arbitrary and capricious, the Commission should take its PRA and IQA obligations seriously, and continue to work toward a less burdensome and more accurate method of identifying areas eligible for MFII support.

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[48] Letter from Rebecca Murphy Thompson, EVP & General Counsel, Competitive Carriers Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 2, WT Docket No. 10-208 (Nov. 3, 2016).

[49] *See* Letter from Caressa D. Bennet, General Counsel, Rural Wireless Association, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, at 6-9, WT Docket No. 10-208 *et al.*, (August 23, 2016) ("RWA Aug. 23, 2016 Ex Parte") (recommending alternative coverage analysis based on field strength measurement and means of avoiding overbroad eligibility determinations in larger census blocks); C Spire Comments at 10 (recommending road-miles-based coverage analysis).

[50] RWA Nov. 10, 2016 Ex Parte at 3.

[51] O'Rielly Remarks Before TPRC 44 at 2.

[52] *Id.*

The Commission's use of data must comply with requirements of the PRA. By enacting the PRA, Congress sought to "ensure the greatest possible public benefit from and maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the Federal Government."[53] Under the PRA, the Commission must certify that an information collection is "necessary, "has practical utility," reduces information collection burdens "including with respect to small entities," uses "effective and efficient statistical survey methodology," and, "to the maximum extent practicable, uses information technology to . . . improve data quality, agency efficiency and responsiveness to the public."[54] In addition, the Office of Management and Budget ("OMB") independently must determine that "the collection of information by the agency is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility."[55] A critical "element of OMB's analysis under the PRA is an assessment of the expected usefulness of the information to be collected."[56]

An MFII framework that permits large carriers to overstate their coverage to exclude competitors from the initial eligibility determination, and leaves it to smaller would-be recipients of MFII support to correct those mistakes through an interminable number of case-by-case challenges, would plainly fail the requirements of the PRA. Given the patent unreliability of the coverage and speed data used to conduct the initial determinations, neither the Commission nor OMB could reasonably find that the information has "practical utility." Nor could the FCC certify use of the data as reflecting an effort to reduce burdens, especially on small entities. Indeed, if a competitive carrier simply wished to ascertain whether it would continue to receive support for each site on its network, it would have to test coverage surrounding an incredible number of cellular sites. And if that carrier wished to challenge the FCC's incorrect determinations, it would have to complete potentially thousands of hours of paperwork and hire a cavalry of full-time employees, to document the results of its analysis and prosecute each challenge at the Commission. Even assuming that the FCC could achieve some degree of accuracy in making initial determinations, the challenge process would overwhelm competitive carriers given the large volume of cellular sites that comprise a typical carrier's mobile network. As senior executives from a number of small and regional wireless carriers recently explained, "the use of a challenge process that relies upon fundamentally flawed data and in turn places the burden on challengers to disprove coverage claimed by multiple national providers across millions of square miles in a thirty to sixty-day window will fail and leave huge coverage gaps in rural America."[57]

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[53] 44 U.S.C. § 3501(2).

[54] *Id.* § 3506(j).

[55] *Id.* § 3508; *see also* OFFICE OF MGMT. AND BUDGET, EXEC. OFFICE OF THE PRESIDENT, Circular No. A-130 Revised (Nov. 28, 2000) ("Agencies must collect or create only that information necessary for the proper performance of agency functions and which has practical utility.").

[56] *Tozzi v. EPA*, No. Civ. 98-0169 (TFH), 1998 WL 1661504 at *3 (D.D.C. Apr. 21, 1998).

[57] *See* Wireless Executives Ex Parte at 2.

The MFII framework under consideration fares no better under the IQA. Under OMB's and the Commission's own IQA guidelines, the Commission must ensure the "quality, objectivity, utility, and integrity of information (including statistical information) disseminated by" the agency.[58] The Commission must apply heightened standards for "influential scientific or statistical information" that has a "clear and substantial impact on important public policies," including the FCC's universal service policies, or on "important private sector decisions," including the decisions that carriers must make regarding their existing facilities and future network expansion plans.[59] As described above, Form 477 mobile coverage data lacks quality, objectivity, utility, and integrity, as it provides an inherently unreliable account of mobile broadband coverage, particularly in rural areas, and would accomplish little in the way of supporting an accurate and administrable process for identifying areas eligible for MFII support. Thus, the IQA, OMB guidelines, and the Commission's own guidelines on data quality straightforwardly prohibit the Commission from relying on Form 477 data in light of its fundamental flaws.

OMB guidelines adopted pursuant to the IQA also require the FCC to submit all influential scientific information on which it relies in this proceeding for peer review "by qualified specialists before it is disseminated."[60] On September 30, 2016, the Commission disseminated the results of its analysis of the use of Form 477 data for MFII eligibility determinations, but did not subject that analysis to peer review as required by law. Nor has the Commission placed its assessment showing that the challenge process can support accurate and administrable determinations of qualifying service availability through the peer review process—assuming that the Commission has made such an assessment at all.

III. The MFII Framework Should Ensure that Rural Americans Benefit from Wireless Competition.

In addition to directing the Commission to preserve and advance universal service, the Communications Act also requires the Commission to promote wireless competition.[61] As a result of Congress's dual mandates, the Commission must "see to it that *both* universal service and . . . competition are realized," and that one end is not "sacrificed in favor of the other."[62]

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[58] Information Quality Guidelines at ¶ 5.

[59] Information Quality Guidelines at App. A § II(6); OFFICE OF MGMT. AND BUDGET, EXEC. OFFICE OF THE PRESIDENT, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452 at 8452, 8460 (Feb. 22, 2002).

[60] OFFICE OF MGMT. AND BUDGET, EXEC. OFFICE OF THE PRESIDENT, Final Information Quality Bulletin for Peer Review, at 2 (Dec. 16, 2004), http://www.cio.noaa.gov/services_programs/pdfs/OMB_Peer_Review_Bulletin_m05-03.pdf.

[61] *See, e.g.*, 47 U.S.C. §§ 332(a)(3), 332(c)(1)(C).

[62] *Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 615 (5th Cir. 2000).

Although principles of competition and universal service can conflict in some cases, in this proceeding they are mutually reinforcing.

First, competitive dynamics in rural areas are essential to the Commission's ability to comply with its statutory mandate to provide quality, reasonably comparable services in all regions at just, reasonable, and affordable rates. As the Commission and the courts consistently have found, monopolists charge unjust and unreasonable rates and impede access to innovative new technologies, especially in the absence of a legitimate threat of entry.[63]

Second, the presence of at least two providers in a given area—one that operates on a CDMA network standard and another that operates on a GSM network standard—is essential to ensuring that homes, businesses, and areas of economic activity in all regions have access to at least one provider of advanced telecommunications services. This is the case for two reasons, each of which the Commission has acknowledged in the context of setting wireless policy. As an initial matter, geography, manmade disturbances, and spectrum characteristics can create gaps in coverage even in areas where a wireless carrier ostensibly provides service.[64] As a result,

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[63] *See, e.g., United States v. Apple, Inc.*, 791 F.3d 290, 351 (2d Cir. 2015) (noting that "innovation" is a "hallmark and benefit of competition"); *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 489 (2d Cir. 2004) ("Competition, which fosters innovation and tends to lower prices for consumers, directly pits one producer against another"); *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1237 (D.C. Cir. 1980) ("In monopolized markets FCC rate regulation serves the purpose of limiting carriers to just and reasonable rates in order to prevent monopoly pricing. In competitive markets, on the other hand, just and reasonable prices are normally maintained through the effect of free competition"); *Policies Regarding Mobile Spectrum Holdings*, Report and Order, 29 FCC Rcd. 6133, 6134 ¶ 1 (2014) ("Competition among mobile wireless providers leads to lower prices, more innovation, and greater investment"); *Petition of Quest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(C) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd. 8622, 8626 ¶ 37 (2010) (discussing the Commission's "traditional market power framework," which identifies "when competition is sufficient to constrain carriers from imposing unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, and conditions" based on the presence of actual competition or the threat of entry by a potential competitor").

[64] *See, e.g., Reexamination of Roaming Obligations of Commercial Mobile Radio Serv. Providers & Other Providers of Mobile Data Servs.*, 25 FCC Rcd. 4181, 4191 (2010) (noting that wireless carriers have "gaps in their network coverage, including in areas where they hold spectrum rights"); CCA 2014 Reply Comments at 8; *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Sixteenth Report, 28 FCC Rcd. 3700, 3744 (2013) (noting that a "provider's having network coverage in an area does not mean that a provider actually offers its service to residents in all of that area"); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Nineteenth Report, 31 FCC Rcd. 10534 ¶ 104 (2016) (noting that "speed and performance measurements are only valid when a wireless connection can be accessed: 'Dead zones' and loss of signal reduce wireless effectiveness") (citing *FCC Omnibus Broadband Initiative (OBI));* Federal Communications Commission,

wireless subscribers in areas where coverage maps overlap may in fact only receive service from one provider. Moreover, because many devices are compatible with only GSM networks or only CDMA networks, both networks must be available to ensure that consumers have consistent coverage for the many sessions where the device falls-back from a carrier's LTE network or where the carrier does not offer VoLTE service.[65] As NTCA explained, "GSM and CDMA networks are incompatible," and the Commission's decision to support "only one kind of network via a reverse auction could result in a total loss of service for existing consumers, including even the ability to dial 911."[66]

Accordingly, the Commission has a clear path toward harmonizing its universal service policies with its long-standing commitment and statutory obligation to promote wireless competition. In developing final eligibility criteria for MFII, the Commission should adopt funding rules to ensure that at least one CDMA carrier and one GSM carrier operate in all areas. By doing so, the MFII will make access available in more parts of the country, and will allow more consumers to benefit from the continuous improvements in price, service, and quality of service enabled by wireless competition.

Broadband Performance: OBI Technical Paper No. 4, at 19, https://apps.fcc.gov/edocs_public/attachmatch/DOC-300902A1.pdf.

[65] *See, e.g.*, Letter from Jill Canfield, Vice President, Legal & Industry and Assistant General Counsel, NTCA-The Rural Broadband Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 3, WT Docket No. 10-208 *et al.*, (Feb. 15, 2017) (stressing the "the importance of recognizing that the GSM and CDMA networks are incompatible" and that "[f]lash cutting all support where only one LTE network is currently available could result in a total loss of voice service for existing consumers, including even the ability to dial 911"); RWA Oct. 27, 2016 Ex Parte at 4-5 (noting that "support for a CDMA carrier where an unsubsidized GSM carrier provides service (or vice versa), or support for both a CDMA and GSM carrier in an area, is not duplicative," because it "will be years before VoLTE service is ubiquitous throughout rural America and all consumers have VoLTE-capable handsets"); *see also* Notice of Ex Parte Presentation of Panhandle Telephone Cooperative, Inc., WT Docket No. 10-208 *et al.*, (Dec. 17, 2014); U.S. Cellular Feb. 25., 2016 Ex Parte at Attachment p. 17; Letter from Rebecca Murphy Thompson, EVP & General Counsel, Competitive Carriers Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 10-208, at 2 (Oct. 13, 2016); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Eighteenth Report, 30 FCC Rcd. 14515 ¶¶ 116-20 (2015) (acknowledging the limited rollout of VoLTE service); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Seventeenth Report, 29 FCC Rcd. 15311 ¶ 58 (2014) (noting that the mobile wireless service in the United States has proceeded along "two main technology migration paths," *i.e.*, "the CDMA and GSM paths," because the Commission "does not mandate any particular technology or network standard for commercial mobile wireless licensees").

[66] NCTA Oct. 27, 2016 Ex Parte at 1.

IV. The Commission Should Adopt Rational, Pro-Consumer Legacy Support Mechanisms that Are Predictable and Sufficient.

Another key principle of universal service policymaking is to ensure that support mechanisms are "predictable" and "sufficient."[67] The "predictability principle" requires the Commission to adopt "predictable rules that govern the distribution of . . . subsidies."[68] To comply with the predictability principle, the Commission must ensure that changes in the distribution of universal support do not excessively "impact" current recipients and "the communities served by those carriers."[69] Moreover, the Commission must provide adequate notice of when and where lawful reductions in support will apply, and the extent of those reductions, to comply with the predictability principle.[70] Critically, the principle carries significant force even though carriers do not have a "vested property interest" in the universal support that they receive.[71] While policy shifts governing the distribution of universal service support will be necessary from time to time, the Commission must work to maintain a positive investment climate for universal support initiatives, and to protect carriers and their customers from destabilizing service disruptions.

The Commission's policy of avoiding "flash cuts" in revenue caused by sudden shifts in the regulatory landscape reinforces this statutory directive. Indeed, in the universal service and intercarrier compensation context in particular, the Commission has consistently been careful to transition reductions over time to minimize the impact on "carriers or the consumers they serve."[72]

The Commission should adhere to its statutory obligations and "no flash cuts" policy as it implements its MFII framework. As the Commission well understands, rural carriers have made network investments over the years on the basis of universal service support. They specialize in investing in rural areas that larger carriers avoid, and serve corners of the marketplace characterized by lower densities and return on investment opportunity. As a result, the Commission should provide these carriers with a reasonable phase-down, in terms of length and amount of support, so that they can maintain service during the transition to MFII. As RWA explains, carriers need "time . . . to seek replacement funding, scale back their business, or exit

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[67] 47 U.S.C. § 254(b)(4).

[68] *Alenco Commc'ns*, 201 F.3d at 623; *see High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, 73 FR 37882-01 (2008).

[69] *In re FCC 11-161*, 753 F.3d at 1060 ("FCC acted reasonably when it made specific findings that existing support recipients 'would be minimally affected by the Order'") (alteration omitted).

[70] *Id.* at 1064.

[71] *USF/ICC Transformation Order* at ¶ 293.

[72] *See USF/ICC Transformation Order* at ¶ 242.

the business without the massive disruption a flash cut would cause."[73] Financers of rural broadband service confirm that "[w]ithout a sufficient, sustainable predictable level of support, deploying affordable broadband in high cost areas is not economically viable" and "therefore, not financeable."[74] Moreover, as discussed above, a flash cut for carriers also could result in a flash cut for consumers, and place rural consumers at risk of losing access to emergency services. The Commission cannot simply ignore this problem.

The Commission's legacy support mechanisms also must ensure that all legacy providers are treated fairly—and rationally. Indeed, there is no plausible basis for the Commission to flash-cut support in areas deemed ineligible for MFII funding, while providing a gradual phase-down in support to losing bidders or in areas where the reverse auction fails. Providers serving areas deemed ineligible under the new rules are just as vulnerable to changes in financial circumstance as are other providers, and wireless customers are equally vulnerable to service disruptions regardless of the reason why their carrier ceased receiving cost support. If the Commission believes that some providers in some areas would be particularly vulnerable to a flash cut, that fact would merit the provision of a more generous phase-out for those providers—and not the elimination of phased-out support for other carriers.[75]

Importantly, the Commission's reliance on a poorly defined challenge process would further undermine its ability to comply with the principle of predictability. As mentioned above, the predictability principle requires that the Commission provide adequate notice about areas where support ultimately will be reduced. If key details about the evidence used to sustain a challenge are left unresolved, or if uncertain challenges become the norm rather than the exception, the Commission's MFII policy will keep carriers in the dark about the status of their existing network facilities, and deprive them of the ability to engage in even basic business and network planning.

V. The Commission Should Set Policies Critical to Our Broadband Future Through a Fair, Open, and Transparent Process.

Within days of assuming office in January, Chairman Pai issued a series of process reforms to "make the agency's operations more transparent,"[76] building on his longstanding criticism of the secrecy with which the Commission often operates. Among these initiatives was

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[73] Letter from Caressa D. Bennet, General Counsel, Rural Wireless Association, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 10-208 *et al.*, (Oct. 31, 2016).

[74] Letter from Robert F. West, Senior Vice President, Communications Banking Group, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 2, WT Docket No. 10-208 *et al.*, (Oct. 28, 2016).

[75] *See Connect Am. Fund*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd. 10139 ¶ 98 (2016) (providing a more gradual phase-out for AT&T in hard-to-serve areas).

[76] Statement of FCC Chairman Pai Announcing Pilot Program at 1.

a "pilot program" to release drafts of FCC documents in advance of a Commission vote.[77] The documents selected for inclusion in the Chairman's pilot program include two items scheduled for a vote at this month's open meeting: a notice of proposed rulemaking on ATSC 3.0, and a report and order on the siting of FM translators. Conspicuously absent from the pilot program, however, is a third item slated for consideration next Thursday: the report and order on MFII.

While CCA applauds the Chairman's commitment to transparency and other process reforms, it questions why that commitment has given way in this proceeding. MFII is as complex, consequential, and cross-cutting as any FCC order in recent memory. Its success or failure will determine the success or failure of the Chairman's digital empowerment agenda,[78] and will impact nearly every important Commission initiative from broadband progress to 5G. If there were ever an item meriting public release in advance of a vote, the MFII report and order would be it.

Rather than seek much-needed public input, the Commission is working at a break-neck pace to rush through—or in some cases, totally ignore—complex implementation details at the very last minute, while "the public is kept completely in the dark."[79] In the process—or perhaps because of the process—the Commission is shortcutting its analysis and skipping over key decision points altogether on which the public is well-positioned to provide input and guidance. The Commission has not followed through on calls to evaluate alternative means of determining service availability. It has not provided further information on the challenge process, nor on the data carriers may use as part of that process, even though it apparently has concluded that the process will resolve any issues created by a clumsy proposal. Perhaps most shockingly, the Commission abruptly changed its approach to legacy support without so much as inquiring about the impact on carriers and their rural customers.

Rural Americans deserve much more than the short shrift given to them by this Commission, and the Administrative Procedure Act ("APA") demands that they receive it. Under the APA, the Commission must publish "a [g]eneral notice of proposed rule making . . . in the Federal Register" that discusses "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[80] In addition, the Commission must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments."[81]

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[77] *Id.*

[78] Federal Communications Commission, Summary of FCC Commissioner Ajit Pai's Digital Empowerment Agenda (Sept. 13, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-341210A2.pdf.

[79] Statement of FCC Chairman Pai Announcing Pilot Program at 1.

[80] 5 U.S.C. § 553(b).

[81] *Id.* § 553(c).

To comply with the APA's notice and comment requirements, the Commission must provide information "sufficient to advise interested parties that comments directed" to the disputed aspects of the rule "should have been made."[82] In addition, the notice must provide interested parties with "enough information to comment and for the agency to consider and respond to the comments."[83] Thus, "general" descriptions of rules under consideration do not "provide adequate notice."[84] Moreover, when the Commission chooses an "ultimate standard" outside the scope of the "range of alternatives" provided in the notice,[85] it violates the APA, because it provides "interested parties" with "no reason to comment" on the final measure.[86] Finally, "[i]t would appear to be a fairly obvious proposition" that when the Commission relies upon studies in promulgating a rule, those studies "must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment."[87]

These requirements make clear that the Commission must provide the public with more meaningful notice and opportunity to comment before adopting a challenge process. Although the Commission sought comment on "the best way to verify in [a challenge process] that proposed ineligible areas are in fact served by LTE," that general pronouncement offered no indication of the methodology that the Commission ultimately would choose to adopt.[88] Thus, to comply with the APA's procedural requirements, the Commission must publish notice and seek comment on the evidence of service availability that would inform the challenge process, among other critical details. That is particularly important given the large volume of challenges the industry likely will have to make, which will result in the effective substitution of the challenge process's methodology for the methodology used in arriving at initial determinations. In addition, the Commission must publish and seek comment on studies supporting its contention that the challenge process will be capable of correcting the problems with data quality and accuracy associated with information submitted as part of the Form 477 process. Of course, these obligations are independent of the Commission's obligations under the PRA and IQA, which, as described above, prohibit the burdensome framework created by the Commission's use of poor quality data, and, at a minimum, require that the Commission peer review its assessments of Form 477 data and the data that will inform the challenge process.

The Commission has also failed to provide adequate notice of its intention to subject carriers to a flash cut in existing support. In the *Further Notice*, the Commission made clear that legacy support would be available for most carriers. In fact, the Commission advanced a specific

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[82] *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991).

[83] *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011).

[84] *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 170 (2d Cir. 2013).

[85] *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994).

[86] *Time Warner Cable*, 729 F.3d at 170.

[87] *Amateur Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008).

[88] *Further Notice* ¶ 242.

proposal to phase-down existing support and sought comment on other alternatives "regarding the phase-down."[89] To the extent the Commission suggested that some carriers would face a stricter phase-down, it did so with respect to the narrow category of carriers for whom high-cost support "represents one percent or less of its wireless revenues."[90] As a result, an across-the-board flash cut in areas deemed newly ineligible would not fall within the "range of alternatives" from which the Commission indicated that it would choose an "ultimate standard" on legacy support.[91] In addition, the Chairman's fact sheet from last October not only failed to mention that any carrier would face a flash cut in support, but also reassured the industry and its customers that a phase-down would apply to all carriers.[92] Given the abrupt shift in the content of the order, the Commission must provide notice and seek comment on this key element of the MFII framework.

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CCA urges the Commission to delay its consideration of the MFII order to cure the issues identified herein. Through a transparent process with industry participation, CCA is confident the Commission can craft an MFII framework that meets its policy goals of ensuring broadband availability throughout rural America.

Sincerely,

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[89] *Id.* ¶¶ 252-53.

[90] *Id.*

[91] *See* RWA Oct. 27, 2016 Ex Parte at 7-8 (noting that "[f]rom an administrative law standpoint," any flash cut or abrupt phase-down in legacy support "should have been put in a further notice of proposed rulemaking rather than being addressed in an Order for the first time").

[92] Federal Communications Commission, Chairman Wheeler's Proposal to Advance Seamless Nationwide Access to 4G LTE Mobile Voice and Broadband Service (Oct. 27, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-341951A1.pdf.